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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [redacted]76

ROBERT MITCHELL, PLAINTIFF IN ERROR,

vs.

A. M. OVERMAN, ADMINISTRATOR OF CONRAD STUTZMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED AUGUST 3, 1878.

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No. 450.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday in April, being the second day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second: Present, the honorable Philip S. Swing, one of the judges of said court. Among the proceedings had were the following, to wit:

A. M. OVERMAN, ADMINISTRATOR OF THE estate of Conrad Stutzman, deceased,
vs.
ROBERT MITCHELL.
} Money.

Be it remembered, that heretofore, to wit, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-three, came the said plaintiff, by S. Sibley, his attorney, and filed in the clerk's office of our said circuit court his said petition against the said defendant, clothed in the words and figures following, to wit:

A. M. OVERMAN, ADM'R OF THE ESTATE OF Conrad Stutzman,
vs.
ROBERT MITCHELL.

2 In the circuit court of the United States for the southern district of Ohio.

Your petitioner, A. M. Overman, by S. Sibley, his attorney, states that he is a resident & citizen of the State of Iowa, and that Conrad Stutzman, of whose estate pl'ff is administrator, was also at his death a citizen & resident of said State of Iowa, and that def't, Robert Mitchell, is a citizen & resident of the State of Ohio, & of said southern district.

And your petitioner states that the def't is indebted to him in the sum of three thousand three hundred and ninety-five & $\frac{55}{100}$ dollars, together with interest thereon at the rate of six per cent. per annum since the 16th day of October, A. D. 1868, and the further sum of forty-four dollars. And as cause therefor pl'ff states that heretofore, to wit, on the 16th day of October, A. D. 1868, to wit, on the 28th day of October, A. D. 1872, the def't was ordered & decreed by the district court of Webster County, in the State of Iowa, to pay to Conrad Stutzman the aforesaid sums of money, with interest as aforesaid; and it was by said court at said time, at a regular term thereof, in an action therein on the chancery side, wherein said Conrad Stutzman was pl'ff, and the def't, Robert Mitchell, was def't, implicated with divers other persons, ordered, adjudged, and decreed that said Conrad Stutzman have & recover from the def't, Robert Mitchell, the sum of $3,395 $\frac{55}{100}$, and also the further sum of $44 costs in said action taxed against said Mitchell, together with interest on said sum of $3,395 $\frac{55}{100}$ at the rate of six per cent.
3 per annum from the 16th day of October, A. D. 1868, until paid; which judgment & decree still remains of record in said court, wholly unsatisfied & of full force & effect.

Your petitioner further states that said district court of Webster County, Iowa, is & was at the institution of said action & rendition of said decree a court of general jurisdiction of causes both at law and in

chancery, & that it had jurisdiction to hear said cause, both as to the subject-matter & parties.

Your petitioner further states that said Conrad Stutzman died about the month of November, A. D. 1868, at Polk County, in the State of Iowa, where he then & long prior thereto resided, and that letters of administration duly issued to your petitioner from the circuit court of said Polk County, Iowa, which said circuit court is a court of general jurisdiction, & has jurisdiction of matters of probate & of estate of decedents, authorizing pl'ff to collect said judgment & decree, & otherwise administer the affairs of said decedent's estate.

Your petitioner further states that no part of said sum of money has ever been paid, & the whole sum, with interest so as aforesaid decreed to be due from def't, is now justly due & owing from def't to pl'ff, amounting at this time to the sum of $4,432.76, Sept. 1st, 1873.

Pl'ff attaches hereto as Exhibit A a duly certified copy of said judgment and decree as part of this petition, and also a duly certified copy of the letters of administration aforesaid, marked Exhibit B, & as part hereof.

Wherefore pl'ff asks judgment for said sum of $4,432.76, and
4 interest thereon at six per cent. per annum from September 1st, 1873, & for all proper relief & for costs of suit.

By S. SIBLEY,
Att'y for Pl'ff.

UNITED STATES OF AMERICA,
District of Iowa, ss:

I, A. M. Overman, being duly sworn, do, on oath, state I am plaintiff in the foregoing petition, and that I have read over the foregoing petition & understand the same, and, the matters and things therein set forth and alleged are true, as I verily believe.

A. M. OVERMAN.

Subscribed & sworn to by A. M. Overman before me this 28th day of August, 1873.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, the day & year above written.

[SEAL.]

GEORGE B. CORNHILL,
Clerk C. C. U. S. Dist. of Iowa.

5 *Exhibit A to petition.*

Decree.

In the district court of the State of Iowa, in and for the county of Webster. October term, 1872.

CONRAD STUTZMAN *vs.* ALBERT G. PAINE, JEAN BAPTISTE CAUSA, Joseph G. Jewett, Robert Mitchell, surviving member of the firm of Mitchell & Rammelrburg, Patrick Mitchell, Patrick L. Keating, James Casey, Joshua N. Miller, Philip Burke, W. K. Walbridge, James Rafty, Chas. W. Naher, George Poldevert & Elizabeth Sheriff.	}	No. 150. Equity.

This cause came on for final hearing on the 16th day of October,

1868, it being a day of the October term of this court, A. D. 1868, and S. Sibley and Geo. W. Bassett appeared for pl'ff, and J. E. Jewett appeared pro se., and Duncombe & Beecher and H. C. Henderson appeared for all the other def'ts except Albert G. Paine & Jean Baptiste Causa, and said Causa and Paine made no appearance, and it appearing they had both been duly served with notice of this suit more than sixty days prior to said term of court & that the court has jurisdiction of
6 said last named def'ts, the default of said Paine and Causa is hereby ordered and decreed, and the relief prayed against them & each of them is hereby decreed pro confesso; and as to said other parties, plaintiff and defendants, the cause was submitted upon the pleadings and proofs on file, and after argument of counsel the cause was then finally submitted and taken under advisement by the court, the decree herein to be rendered as of the said term of said trial & submission.

And thereafter and heretofore, to wit, at the October term of this court, 1870, the def't Robert Mitchell asked leave to amend his answer, which was granted at the May, A. D. 1871, upon terms.

And thereafter and at this present term of this court said amendment was stricken from the files for non-compliance with such terms.

And now the court doth order, adjudge and decree as of the said October term, 1868, that the defendant, Joseph E. Jewett, pay to the pl'ff the sum of six thousand five hundred twenty nine & $\frac{94}{100}$ dollars ($6,529.94\frac{94}{100}$), and that pl'ff have and recover said sum from said Joseph E. Jewett, together with interest thereon at the rate of ten per cent. per annum since the sixteenth (16th) day of October, A. D. 1868, till paid; but said sum shall be credited with whatever sum the pl'ff shall collect or receive from the def't, Robert Mitchell, under this decree.

And the court doth further order, adjudge and decree that the def't, Robert Mitchell, pay to the pl'ff the sum of three thousand three hundred ninety-five & $\frac{58}{100}$ dollars ($3,395.58), together with interest thereon at the rate of six per cent. per annum from said sixteenth day of October, 1868, being the last day of the said October term of this
7 court, 1868, and that the pl'ff have and recover from the said defendant, Robert Mitchell, the said sum of three thousand three hundred ninety-five & $\frac{58}{100}$ dollars, together with interest thereon at the rate of six per cent. per annum from said sixteenth day of October, 1868, until the said sum shall be paid, and also the costs herein to be taxed, forty-four dollars.

And the court doth further order and decree that said def't, Jewett, was late att'y for pl'ff in the foreclosure of the note and mortgage made by Albert G. Paine, def't, to pl'ff & wrongfully foreclosed the same in part in his own name and part in the name of Benjamin Bryant and wrongfully assigned such decree of foreclosure to Mitchell & Rammelsburg, of whom def't, Robert Mitchell, is sole surviving partner, authorizing said Mitchell & Rammelsburg to satisfy out of such decree a judgment debt recovered by said Mitchell & Rammelsburg against said defendant Jewett in the district court Polk Co., Iowa, Sept. 12th, 1860, for the sum of twelve hundred eighty-seven & $\frac{51}{100}$ dollars ($1,287\frac{51}{100}$), after deducting which debt with interest from the amount def't, Robert Mitchell, bid in the said mortgaged land on execution sale there remains due to pl'ff from said Robert Mitchell the sum aforesaid; and pl'ff is the owner in equity of the said decree in this court rendered in favor of Benjamin Bryant against Albert G. Paine & others, def'ts, and may collect the same to his own sole use and benefit, and any sum collected by pl'ff thereon shall be credited to def't, Jewett, on the sum herein decreed due from said Jewett to pl'ff.

And it is further ordered, adjudged and decreed that the error in the deed and mortgage between pl'ff & def't Paine was corrected by
8 the written stipulation of the parties herein, so that the effect of the foreclosure & sale under the same was the same as if the deed & mortgage had read "northwest" quarter of southeast quarter of sec. 24, town. 90 north of range 29 west, instead of "northeast."

It is further decreed this suit be dismissed as to def'ts Keating, Causa, Miller, Burke, Walbridge, Rafty, Maher, Paldevert, Scheriff & Patrick Mitchell, and that the lands purchased by them from defendant Robert Mitchell be discharged from all lien or claim against the same on account of said notes, mortgage & judgment thereon & that they receive their costs of pl'ff to be taxed.

And this decree is ordered entered now as of the 16th day of October, A. D. 1868, the last day of the October term of this court, 1868, and shall take effect as of that date.

D. D. CHASE, *Judge.*

STATE OF IOWA,
Webster County, ss:

I, W. Sumpkin, clerk of the district court in and for said county & State, do hereby certify that the foregoing is a true and correct copy of the decree of said court rendered in the case of Conrad Stutzman against Albert G. Paine, Joseph E. Jewett, Robert Mitchell & others, as the same was rendered and now remains of record in the said court, & that I have compared the foregoing with the original record of such
9 decree in said court and the same in every particular agrees therewith.

In witness whereof I have hereunto set my hand & the seal of said district court, at Fort Dodge, in said county & State, this 26th day of August, A. D. 1873.

[SEAL.] W. SUMPKIN,
Clerk D. C.

STATE OF IOWA,
Webster County, ss :

I, Daniel D. Chase, do hereby certify that I am sole presiding judge of the district court in and for said county & State, & that the foregoing attestation of the record of such court is in due form, and that W. Sumpkin is the clerk of said court, & said attestation is made by him.

D. D. CHASE,
Judge of the Eleventh Judicial District of Iowa.

Exhibit B to petition.

State of Iowa to A. M. Overman sends greeting:

Whereas the late Conrad Stutzman departed this life intestate on the day of December, A. D. 1872, being at or immediately
10 previous to his death a resident of the county of Polk, and having property to be administered upon within said county, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits, whereof the said intestate died possessed in the State of Iowa, and also the auditing, allowing, and final discharging the account thereof do appertain unto the circuit court of Polk County; and the said court, being desirous that the goods, chattels, and credits may be well and faithfully administered, applied, and disposed of, doth grant these letters of administration unto you, the said A. M. Overman, full power, by these presents, to administer and faith-

fully dispose of all and singular the goods, chattels, and credits, to ask, demand, recover, and receive the debts which unto the said intestate while living, and at the time of his death, did belong, and to pay the debts which the said intestate did owe after the same shall have been verified and filed and approved by said court, as far as such goods, chattels, and credits will thereunto extend and the law require; hereby requiring you to make and return to said court a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate within thirty days after the date hereof. And if further personal property or assets of any kind not mentioned in any inventory that shall have been so made shall come to your possession or knowledge, to make and return in like manner a true and perfect inventory thereof forthwith; and also to render a just and true account of administration within one year from the date hereof, and whenever required by said court; and the said court aforesaid doth, by these presents, depu-
11 tize, constitute, and appoint you, the said A. M. Overman, administrator of all and singular the goods, chattels, and credits which were of the said Conrad Stutzman, deceased.

In testimony whereof I, H. H. Griffiths, clerk of the circuit court of Polk County, in the State aforesaid, have set my hand and caused the seal of said court to be affixed at Des Moines this 26 day of December, A. D. 1872.

[SEAL.] H. H. GRIFFITHS, *Clk.*
J. M. GRIFFITHS, *D'p.*

STATE OF IOWA,
Polk County, ss:

I, J. H. McClelland, clerk of the circuit court in & for said county, do hereby certify that the within is a true copy of the original letters of administration in said cause, as full, true, & complete as the same remain of record in my office.

Witness my hand and the seal of said court this 28th day of August, A. D. 1873.

[SEAL.] J. H. McCLELLAND, *Clk.*

STATE OF IOWA,
Polk County:

I, John Mitchell, judge of the circuit court of the fifth judi-
12 cial circuit of Iowa, do hereby certify that J. H. McClelland is the duly elected, qualified, & acting clerk of the circuit court in and for the county of Polk, Iowa; that his certificate is in due form of law; that his signature to the same is genuine.

Witness my hand this 29th day of August, 1873.

JOHN MITCHELL,
Judge, Fifth Judicial Circuit of Iowa.

(Endorsed on back:) Estate of C. Stutzman. No. 398. Letters of administration to A. M. Overman. Copy.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons ad respondendum in said cause, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Robert Mitchell, citizen of and

rssident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern
13 district of Ohio aforesaid, at Cincinnati, on the fifth Tuesday in the month of September, 1873, to answer unto A. M. Overman, citizen of and resident in the State of Iowa, in an action for money only. Amount claimed, $4,432.76–100 and interest thereon at six per cent. per annum from September 1st, 1873.

And have you then and there this writ.

Witness the honorable Nathan Clifford, Acting Chief Justice of the United States, this 15th day of September, A. D. 1873, and in the 98th year of the Independence of the United States of America.

Attest:
[SEAL.] THOMAS AMBROSE,
Clerk.

And afterwards, to wit, on the twenty-second day of September, in the year last aforesaid, came the said marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon clothed in the words and figures following, to wit:

I rec'd this writ at Cin'to, O., at 11 a. m. on 15 September, A. D. 1873, and served true copy hereof as follows: At res. at 3 o'clock p. m. on the 18th day of September, A. D. 1873.

W. R. THRALL,
U. S. Marshal,
By L BROWN, *Dep.*

14 And afterwards, to wit, on the seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-four, came the said defendant, by King, Thompson and Longworth, his attorneys, and, by leave of court first had and obtained, filed in the clerk's office of the court aforesaid his certain answer in said cause, clothed in the words and figures following, to wit:

Answer.

U. S. circuit court, southern district of Ohio.

A. M. OVERMAN, ADMINISTRATOR OF THE ESTATE of Conrad Stutzman,
against
ROBERT MITCHELL. } 1786.

1. And now comes the said Robert Mitchell, defendant, by leave of court first had, and for answer to said plaintiff's petition, denies that there is any such record as is alleged in said petition, and this the defendant is ready to verify upon the hearing hereof.

2. In further answer to said petition the defendant says that on the 10th day of November, A. D. 1869, and after the commencement of the action against this defendant, impleaded with Albert G. Paine & others, referred to in said petition, said Conrad Stutzman departed this life intestate; that by the laws of the State of Iowa in force at the time of his death, and at the time said pretended decree was entered, it is provided as follows: "An order to revive an action in the names of the repre-

sentatives or successors of a plaintiff may be made forthwith, but
15 shall not be made without the consent of the defendant after the expiration of one year after the time the order might have been first made."

The defendant says that said action was not revived in the name of the administrator or other representative or successor of said Conrad Stutzman, deceased, within the time required by law, nor has it, in fact, ever been revived; and by reason of said failure to revive said action the same abated under the law of the State of Iowa, hereinbefore referred to, and said pretended decree is null and void.

3. This defendant further says that said Conrad Stutzman died intestate November 10th, A. D. 1869; that no administrator to his estate was appointed till December 26th, 1872, and that said pretended decree against this defendant was entered on the 28th day of October, 1872, the complainant having then been dead nearly three years, and no representative of himself or his estate having been made a party to said action, and said pretended decree was and is absolutely null and void.

4. This defendant says that the said pretended decree upon which this action is founded was entered without his knowledge; that when he learned of it he employed counsel to take steps to have the same set aside; that said counsel was about to file a petition to that end when he ascertained that at the time said pretended decree was entered said Stutzman had been dead more than one year, and that the said action had not been revived in accordance with the laws of said State of Iowa, and that by such default the said action had abated; said counsel therefore did not deem it decessary or proper to take any further action in the matter. And this defendant avers and charges that at the
16 time said pretended decree was entered the attorney of said plaintiff, who had been of counsel for said Stutzman in said action, well knew of the death of said Stutzman, and that the action had not been revived in the name of any representative or successor of said deceased, and the entry of said pretended decree was procured by withholding from the court a knowledge of said facts and was a fraud upon the defendant.

Wherefore the defendant prays that this action may be dismissed at plaintiff's costs.

KING, THOMPSON & LONGWORTH,
Attorneys for Defendant.

STATE OF OHIO,
Hamilton County, ss:

Robert Mitchell makes oath and says that he is defendant in the above-entitled action, and that he believes the facts stated in his foregoing answer to be true.

ROBERT MITCHELL.

Sworn to before me and subscribed in my presence this 17th day of January, A. D. 1874.

THOS. AMBROSE,
Clerk Cir. Ct, U. S.

And afterwards, to wit, on the second day of February, in the year last aforesaid, came the said plaintiff by his said attorney and
17 filed in the clerk's office of the court aforesaid his certain demurrer to the defendant's answer, clothed in the words and figures following, to wit:

Demurrer to answer.

U. S. circuit court, southern district of Ohio.

A. M. OVERMAN, ADM'R, &C., }
vs. }
ROBERT MITCHELL. }

Comes the pl'ff, by S. Sibley, his att'y, and demurs to the 2d, 3d, & 4th paragraphs of the def'ts answer, and says that the matters & things therein set forth constitute no defence to the cause of action of pl'ff in his petition set forth.

Wherefore he prays judgment whether he shall further reply to said several paragraphs in said answer.

S. SIBLEY,
Pl'ff's Att'y.

And afterwards, to wit, on the twenty-first day of January, in the year of our Lord one thousand eight hundred and seventy-five, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

18 *Demurrer overruled.*

A. M. OVERMAN, ADM'R, }
vs. } No. 1786. Money.
ROBERT MITCHELL. }

This day came the parties by their attorneys, and thereupon this case came on for hearing upon the demurrer of plaintiff to the answer of the defendant and was argued by counsel and submitted, on consideration whereof the court find said demurrer not to be well taken and doth overrule the same; and plaintiff has leave to reply in fifteen days.

And afterwards, to wit, on the twenty-third day of July, in the year last aforesaid, came the said plaintiff, by his said attorney, and, by leave of court first had and obtained, filed in the clerk's office of the court aforesaid his certain reply in said cause, clothed in the words and figures following, to wit:

Replication to plea of def't.

In the circuit court of the U. S. for the southern dist. of Ohio.

A. M. OVERMAN, ADM'R OF ESTATE OF CONRAD Stutzman, de'd, }
vs. }
ROBERT MITCHELL. }

Comes the pl'ff, by his attorney, and for replication to the plea
19 of def't, says:

That as to the first plea pleaded the pl'ff ought not to be barred of his aforesaid action against def't by reason of the matter of such plea, because he says there is such a record of a recovery remaining in the district court of Iowa, in and for the county of Webster, as by pl'ff alleged in his petition; and this he is ready to verify by the said record, and

prays that the same may be duly inspected by the court and whereof a duly certified copy is attached to the petition herein.

2. And as to the 2d plea by def't pleaded pl'ff says he ought not to be barred by his action aforesaid because of anything therein set forth, because he says that prior to the death of said Conrad Stutzman said cause of Conrad Stutzman against Robert Mitchell, def't, impleaded with others as def'ts in said district court of Iowa, in Webster County, had been tried and fully and finally submitted to the court for judgment and by the court taken under advisement and so held till after the death of said Stutzman, and the rendition of final decree was further delayed by dilatory proceedings instituted by said def't Mitchell, viz, by his application for leave to amend his answer in said cause, which was allowed upon terms precedent, & which said def't failed to comply with, for which non-compliance such order or leave was thereafter vacated, and said cause stood upon its original submission to the court as though no such proceedings had been instituted by def't; and thereafter the said court did adjudge and decree in form and substance as set forth in the copy of its decree attached to pl'ff's petition, and as of the term when said cause was tried and submitted to the court, when of right such
20 decree should have been given, and such nunc pro tunc entry of such decree was made upon the suggestion of counsel for said Stutzman, made to the court, that since the trial of such cause said Stutzman had died and no administrator had been appointed for his estate.

And pl'ff avers that the delay in the decision of said cause after its trial, in the lifetime of said Stutzman, was not by the procurement or assent of said Stutzman or his counsel, but was wholly at the instance of def't through his counsel and by the court upon his own motion for his better advisement on the questions in issue.

And pl'ff avers that such decree was in law & equity rendered in the lifetime of said Stutzman, and that the said case was not within the statute pleaded by def't as aforesaid, and no revivor of such case was thereunder requisite or necessary; and this he is ready to verify, &c.

3. And as to the 3d plea by def't pleaded pl'ff says he ought not to be barred of his aforesaid action by the matters & things therein alleged because he says that said recovery by said Stutzman as aforesaid was had prior to the death of said Stutzman in manner and form as stated in the replication to the 2d plea aforesaid; and this he is ready to verify, and prays the court to inspect the record of such recovery as in his replication to the 1st plea prayed.

4. And as to the 3d plea by def't pleaded pl'f says he ought not to be barred of his action aforesaid because of the matters therein set forth, because he says that def't did appear and was represented by counsel, and such counsel, who were among the most eminent in
21 the said State, filed pleadings, attended at the taking of depositions and argued said cause both in the district and supreme courts of the State, and with such success as to defeat pl'ff therein in the recovery of more than half the just demand of said Stutzman.

And pl'ff admits the counsel of said Stutzman knew of his death when said decree was actually made, but he denies that counsel concealed such fact from the court; on the contrary, he avers that such counsel informed the court of the fact of the death of said Stutzman and asked the court to order the decree entered as of the term of the trial of the cause because of the fact of such death, and it was for that reason that the court entered the decree nunc pro tunc, and no objection or excep-

tion thereto was made or taken by said def't. And this he is ready to verify &c.

Wherefore pl'ff prays judgment as in his petition by—

S. SIBLEY, *His Att'y.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Stephen Sibley, being duly sworn, do on oath state I am attorney for the plaintiff in the foregoing-entitled cause, and that I was attorney for Conrad Stutzman in his lifetime in the cause referred to in the foregoing replication, which replication I drew & signed; and the matters and things therein set forth are true as I verily believe.

STEPHEN SIBLEY.

22 Subscribed & sworn to by Stephen Sibley before me this 16th day of July, A. D. 1875.

E. A. DRUMMOND,
U. S. Com.

And afterwards the trial of this cause progressed from term to term, until the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and seventy-eight, at which time an entry was made upon the journal of our said circuit court in said cause, clothed in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

A. M. OVERMAN, ADMINISTRATOR OF THE ESTATE of Conrad Stutzman,
vs.
ROBERT MITCHELL.
} No. 1786.

This cause came on this day for trial before Hon. Philip B. Swing, judge, and the parties having filed with the clerk a stipulation in writing waiving a jury, was submitted to the court upon the pleadings and the evidence, and was argued by counsel; on consideration whereof the court finds as matter of fact that said cause in the district court of Webster County, Iowa, in which was rendered the decree which
23 is the subject of this action, was commenced July 26, 1866, by said Stutzman, as sole plaintiff, against the defendant herein and others, defendants, and at the October term, 1868, was submitted to the court upon written testimony and taken under advisement, and subsequently, at the October term, 1872, to wit, on November 10, 1872, the decree which is the subject of this action, and of which a copy is annexed to the petition herein, was rendered and ordered to be entered; that subsequent to the submission of said cause at the October term, 1868, and while the same was being held under advisement by the court, to wit, on November 10, 1869, said Stutzman, sole plaintiff, died, but no suggestion or notice of his death was ever made of record, nor was said cause ever revived; and no administrator of the estate of said Stutzman, he having died intestate, was appointed until November 26, 1872; and at the time said decree was rendered neither said Mitchell nor his attorney knew that Stutzman was dead, but that fact was known by the attorney of record for Stutzman, who drafted said decree and procured its entry.

The right of action set up by said Stutzman in said suit in Iowa was one which, according to the law of that State, survived in favor of his personal representatives.

During the time between July 26, 1866, and November 10, 1872, the common law on the subject of abatement of actions by the death of a

sole plaintiff was in force in Iowa, except as modified by the following provisions contained in the laws of Iowa in force during said period:

"SEC. 3469. When one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survive in favor of, or against his representatives or suc-
24 cessor, the action may be revived and proceed in their names.

"SEC. 3470. The revivor shall be by a conditional order of the court that the action be revived in the name of the representatives or successors of the party who died, or whose powers ceased, and proceed in favor of or against them.

"SEC. 3472. If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as an original notice, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor at that term of court at which the defendant would be bound to appear were the notice an original one, the action shall stand revived.

"SEC. 3473. Upon the death of a plaintiff in an action it may be revived in the names of his representatives to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

"SEC. 3477. An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made.

"SEC. 3478. When it appears to the court by affidavit that either party to an action has been dead, or where a party sues; or is sued as a personal representative, that his powers have ceased for a period
25 so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, it shall order the action to be stricken from the docket."

That there was no fraud in obtaining said decree.

And the court being of the opinion that the plaintiff is entitled to recover upon the foregoing facts, it is considered that he recover of the defendant the sum of five thousand three hundred & sixty & $\frac{16}{100}$ dollars, with interest from the first day of this term, viz, April 2nd, 1878, and his costs; to all of which the defendant excepts.

26 And afterwards, to wit, on the third day of July, in the year last aforesaid, came the said defendant and filed in the clerk's office of the court aforesaid his certain supersedeas bond in said cause, clothed in the words and figures following, to wit:

Supreme Court of the United States.

A. M. OVERMAN, ADMINISTRATOR OF THE ESTATE of Conrad Stutzman,
vs.
ROBERT MITCHELL.

Know all men by these presents that we, Robert Mitchell, principal, and John Mitchell and Albert H. Mitchell, sureties, all of the county of Hamilton, in the State of Ohio, are held and firmly bound unto the said A. M. Overman, administrator, in the penal sum of ten thousand seven hundred and thirty three dollars, to be paid to the said A. M. Overman, administrator, for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of

our, heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this third day of July, A. D. 1878.

Whereas the above-named Robert Mitchell hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the circuit court of the United States for the southern district of Ohio, at its April term, 1871:

Now, therefore, the condition of this obligation is such that if the above-named Robert Mitchell shall prosecute his said writ of
27 error to effect in the said Supreme Court, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

ROBERT MITCHELL. [SEAL.]
JOHN MITCHELL. [SEAL.]
A. H. MITCHELL. [SEAL.]

Witness:
THOS. AMBROSE.

SOUTHERN DISTRICT OF OHIO, *ss:*

John Mitchell and Albert H. Mitchell, being severally sworn according to law, each for himself says, that he is worth the sum of ten thousand dollars in real estate in his own name, free and unincumbered, lying within the southern district of Ohio, over and above all just debts and liabilities.

JOHN MITCHELL.
A. H. MITCHELL.

Sworn to before me, and subscribed in my presence, this third day of July, A. D. 1878.

THOS. AMBROSE,
Clerk U. S. District Court, S. D. O.

Approved.

PHILIP B. SWING, *Judge.*

28 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein A. M. Overman, administrator of the estate of Conrad Stutzman, deceased, is plaintiff, and Robert Mitchell is defendant, as the same are of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this fifth day of July, A. D. 1878, and in the hundred and third year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court, S. D. O.

29 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court before you, between A. M. Overman, administrator of the estate of Conrad Stutzman, de-

ceased, plaintiff, and Robert Mitchell, defendant, a manifest error hath happened to the great damage of the said Robert Mitchell, as by his complaint appears: And it being fit that the error, if any there hath been, should be duly corrected and full and spedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday in the month of October next, in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

30 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy seven, and of the Independence of the United States of America the one hundred and second.

Attest:

[SEAL.] THOS. AMBROSE, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

To A. M. Overman, administrator of the estate of Conrad Stutzman, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, wherein Robert Mitchell is plaintiff and you, A. M. Overman, administrator of the estate of Conrad Stutzman, deceased, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fifth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and in the one hundred and third year of the Independence of the United States of America.

[SEAL.] PHILIP B. SWING,
District Judge holding the Circuit Court of the U. S. for the Southern District of Ohio.

32 I hereby acknowledge service of the foregoing citation for A M. Overman, administrator of the estate of Conrad Stutzman, deceased, the defendant in error.

July 10, 1878.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Defendant in Error.

(Indorsement on cover:) No. 450. Robert Mitchell, plaintiff in error vs. A. M. Overman, adm'r of Conrad Stultzman, dec'd. S. Ohio C. C. U. S. Filed 3rd August, 1878.

SUPREME COURT U.S.
FILED
DEC 1 1910
JAMES H. MCKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

ROBERT MITCHELL, *Plaintiff in Error,*

vs.

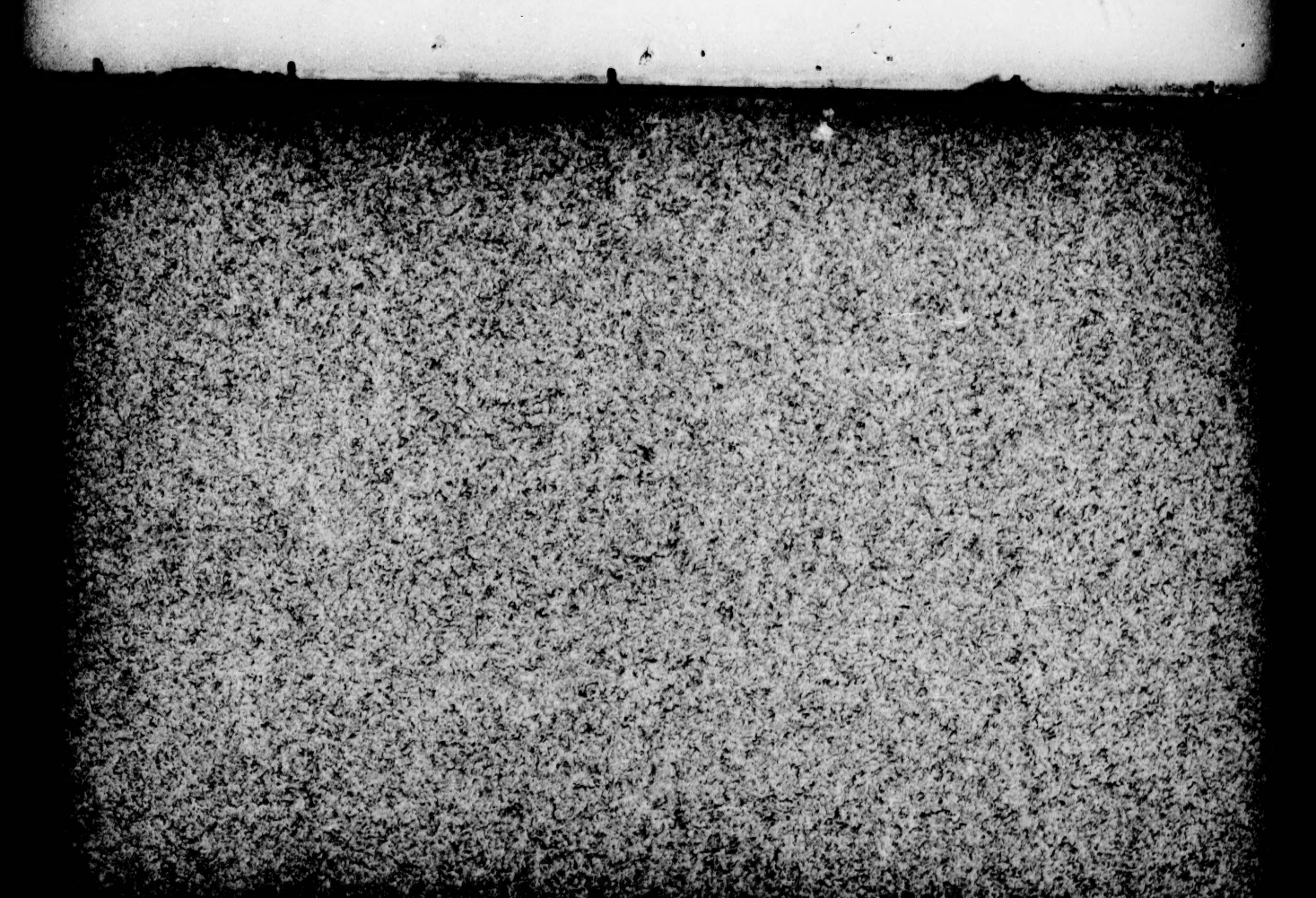
A. M. OVERMAN, ADMINISTRATOR OF CONRAD STUTZMAN.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

RUFUS KING,
SAMUEL J. THOMPSON,
LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

JAMES BARCLAY, 269 VINE ST., CINCINNATI, O.



SUPREME COURT OF THE UNITED STATES.

ROBERT MITCHELL, *Plaintiff in Error,*

vs.

A. M. OVERMAN, ADMINISTRATOR OF CONRAD STUTZMAN.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action below was brought by the defendant in error, A. M. Overman, Administrator of Conrad Stutzman, against the plaintiff in error, Robert Mitchell, upon a decree of the District Court of Webster county, Iowa. A jury was waived, the cause submitted to the court, and a special finding of the facts was made pursuant to Secs. 649 and 700, Rev. Stat. U. S.

The facts found are as follows (Record, 10):

"That said cause in the District Court of Webster Co., Ia., in which was rendered the decree which is the subject of this action, was commenced July 26, 1866, by said Stutzman, as sole plaintiff, against the defendant herein and others, defendants, and at the October term, 1868, was submitted to the court,

upon written testimony, and taken under advisement; and subsequently, at the October term, 1872, to-wit, on November 10, 1872, the decree, which is the subject of this action, and of which a copy is annexed to the petition herein, was rendered and ordered to be entered; that subsequent to the submission of said cause at the October term, 1868, and while the same was being held under advisement by the court, to-wit, on November 10, 1869, said Stutzman, sole plaintiff, died, but no suggestion or notice of his death was ever made of record, nor was said cause ever revived; and no administrator of the estate of said Stutzman, he having died intestate, was appointed until November 26, 1872; and at the time said decree was rendered neither said Mitchell nor his attorney knew that Stutzman was dead, but that fact was known by the attorney of record for Stutzman, who drafted said decree and procured its entry.

"The right of action set up by said Stutzman in said suit in Iowa was one which, according to the law of that State, survived in favor of his personal representatives.

"During the time between July 26, 1866, and November 10, 1872, the common law on the subject of abatement of actions by the death of a sole plaintiff was in force in Iowa, except as modified by the following provisions contained in the laws of Iowa in force during said period.

"'Sec 3469. When one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survive in favor of or against his representatives or successor, the action may be revived and proceed in their names.

"'Sec. 3470. The revivor shall be by a conditional order of the court that the action be revived in the name of the representatives or successors of the party who died, or whose powers ceased, and proceed in favor of or against them.

"'Sec. 3472. If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and

returned within the same time, as an original notice, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor at that term of court at which the defendant would be bound to appear, were the notice an original one, the action shall stand revived.

"'Sec. 3473. Upon the death of a plaintiff in an action it may be revived in the names of his representatives to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

"'Sec. 3477. An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made.

"'Sec. 3478. When it appears to the court by affidavit that either party to an action has has been dead, or where a party sues, or is sued as a personal representative, that his powers have ceased for a period so long that the action can not be revived in the names of his representatives or successors without the consent of both parties, it shall order the action to be stricken from the docket.'

"That there was no fraud in obtaining said decree."

The decree (see Record, 2) referred to in the foregoing findings, is entitled in equity, Conrad Stutzman *vs.* the defendants, naming them, and among others said Mitchell. It recites that the cause came on for final hearing, October 16th, 1868, being a day of the October term; that certain attorneys appeared for the plaintiff and others for certain defendants, including Mitchell; "that the cause was submitted upon the pleadings and proofs on file, and after argument of counsel the cause was then finally submitted and taken under advisement by the court, the

decree herein to be rendered as of the said term of said trial and submission. And thereafter and heretofore, to-wit, at the October term of this court, 1870, the defendant, Robert Mitchell, asked leave to amend his answer, which was granted at the May term, 1871, upon terms, and thereafter, and at this present term of this court, said amendment was stricken from the files for non-compliance with such terms." And thereupon the decree orders and adjudges that the defendant, Robert Mitchell, pay to the plaintiff [Conrad Stutzman], the sum of $3,395 58, together with interest thereon at the rate of six per cent. per annum, from said 16th day of October, 1868, and that the plaintiff have and recover from the said defendant, Robert Mitchell, the said sum. The decree concludes as follows: "And this decree is ordered entered now as of the 16th day of October, A.D. 1868, the last day of the October term of this court, 1868, and shall take effect as of that date."

The Circuit Court being of opinion that upon the foregoing facts, the plaintiff below was entitled to recover, rendered judgment accordingly.

ASSIGNMENT OF ERROR AND ARGUMENT.

We assign for error, that the facts found by the Circuit Court do not sustain its judgment; for the reason that they show that the decree sued on is void, and the judgment below should, therefore, have been for the defendant instead of the plaintiff.

The decree sued on was rendered in favor of a dead man, and in an action which had abated three years previously. It was, therefore, a decree rendered in no action, and in favor of nobody, and was consequently a nullity.

It will of course be conceded that facts showing want of juris-

diction may be pleaded in an action upon a judgment, if they do not appear upon the face of the record, and that even the recital of jurisdictional facts in the record, may be contradicted.

Thompson *vs.* Whitman, 18 Wall., 457.

Spier *vs.* Corll, 33 Ohio St., 236.

Kelly *vs.* Hooper's Execs., 3 Yerger (Tenn.), 395.

The exercise of jurisdiction involved in rendering a judgment, necessarily presupposes an action, and an action in turn implies parties. When, therefore, there is but one party, and consequently no action, there can be no jurisdiction.

The principle is admirably expressed by Vice-Chancellor Wigram, in his opinion in Lee *vs.* Lee, 1 Hare, 617 (A.D. 1842). The sole plaintiff in that suit having died, the defendants moved that the representatives of the deceased plaintiff might revive the suit within a time to be limited, or in default of their so doing, that the bill might be dismissed. The syllabus is as follows:

"In a suit abated by the death of a sole plaintiff, the court has no jurisdiction to order that his representatives shall revive within a time to be limited by the court, or that in default of their doing so, the bill shall be dismissed."

We quote from the opinion:

"The case, it will be observed, is that of a sole plaintiff, whose death necessarily occasions a total abatement of the suit, and leaves no one upon the record against whom the court can act—no one who has ever directly or indirectly made himself party to the proceedings before the court. I notice this, because observations apply to such a case, which do not necessarily apply to a case in which one only of a plurality of plaintiffs dies, leaving a co-plaintiff or co-plaintiffs surviving, or in which a sole female plaintiff marries; although even in these latter cases, the practice, in my humble judgment, can not

be considered as settled. Considering the question apart from authority, it appears clear to me that I have no right to make the order prayed. The suit being abated, and there being no plaintiff remaining upon the record—no one who has ever made himself, or been made, a party to the suit—there is in fact no suit in which I can make an adverse order against any one. There are not, either in form or substance, contending parties, between whom an order adverse to either can be made. And unless, and until, the representatives of the deceased plaintiff are compelled to appear, or appear *gratis*, or are in default for not appearing, the court can have no jurisdiction to make an adverse order against them."

The Vice-Chancellor, in the course of his opinion, refers to the authorities, and especially Chowick *vs.* Dimes, 3 Beav., 290, in which a similar motion had been granted by Lord Langdale, M. R.; and after stating that that case was decided upon the supposed analogy of the cases of defect of suit by the bankruptcy of a plaintiff, or abatement by the marriage of a sole female plaintiff, proceeds to show the distinction between the case of a transfer of the plaintiff.'s interest, whether by bankruptcy or marriage, but still leaving a real living plaintiff as party to the suit, and the case, as at bar, where by reason of the death of a sole plaintiff, there ceases to be any party plaintiff, and consequently can not be a suit. He also puts the query, pertinent at bar, in view of the authorities which our adversaries are likely to cite, whether the decisions relied upon in Chowick *vs.* Dimes "could have been made, if the parties had appeared, not submitting to, but for the purpose of protesting against, the jurisdiction of the court, and opposing the orders being made—whether those orders, so far as they direct the dismissal of the bill, with or without costs, have not been orders taken by the parties at their own peril, and to which

the attention of the court was not directed;" saying further, "I can not find any case, in which, upon an abatement of a suit, by the death of a sole plaintiff, an order like that in Chowick *vs.* Dimes has been made, where the party sought to be affected by the order, has appeared and opposed it."

Canham *vs.* Vincent, 8 Sim. 277; Dryden *vs.* Walford, 1 Y. & Coll., 625, decide the same point as Lee *vs.* Lee.

In Sellas *vs.* Dawson, 2 Anstr., 458, the plaintiff having become bankrupt, the defendant had obtained an order, as of course, to dismiss the bill with costs, for want of prosecution.

The plaintiff moved to discharge that order for irregularity, but Lord Thurlow doubted whether he should discharge an order which, he said, seemed to be originally a mere nullity. The application being renewed a second time, Lord Thurlow said: "He could not make an order to discharge the former order, because that would acknowledge that there could be any order made after a bankruptcy, and when the suit, as he conceived, was abated. He thought it was abated by analogy to abatement at law, which always takes place on a bankruptcy before judgment, either final or interlocutory. He added, that notwithstanding the Exchequer precedents, this was an improper order to have been made originally, and improper to be noticed now, and that it was a mere nullity." The motion to discharge the order was accordingly refused.

The following is the opinion of the court in Murphy *vs.* Redmond, 46 Mo., 318:

"Upon the recovery of a verdict by the plaintiff in the Circuit Court, the defendant moved to set the same aside, and for a new trial. The cause was then continued to the next term of the court. At the term to which the cause stood continued, the death of the plaintiff was suggested and entered of record.

No action was taken to bring in the dead party's representatives, nor did they appear voluntarily. The court, nevertheless, without such appearance, and without the issue of a *scire facias*, proceeded at once to act upon the defendant's motion for a new trial, and overruled it, and then granted an appeal to the District Court, where the judgment was affirmed, and the defendant now brings the case here by writ of error.

"All the proceedings in the lower court, subsequently to the suggestion of the death of the plaintiff, were *ex parte* and unwarranted. There was no party plaintiff in the court. No steps could therefore be properly taken in the cause until that deficiency was supplied, either by the voluntary appearance of the deceased's representatives, or upon *scire facias*. Until that was done, the effect of the death of the plaintiff was to suspend all further proceedings. The overruling of the motion for a new trial (and it might with equal propriety have been sustained, so far as the regularity of the court's action was concerned), and the granting of the appeal, were irregular and ineffective—mere nullities."

West *vs.* Jordan, 62 Me., 484, was an action on the case by husband and wife for an injury to the wife. A verdict was found for the plaintiffs. At a subsequent term, the wife having died meanwhile, judgment was rendered on the verdict and entered, but without any suggestion of the death of the wife. Subsequently the husband, having been appointed administrator, moved that the action should be brought forward, in order that the proper judgment might be entered. The motion was allowed against the defendant's objection. And thereupon the case was brought forward, and under the direction of the court an entry was made, setting forth the death of the wife, the withdrawal of the husband as a party, and a discontinuance on his part as an original party, his appearance to prosecute the suit as administrator of the wife, and the ren-

dition of judgment on the verdict in his favor as administrator. No entry was made setting aside the former judgment. The case was taken to the Supreme Court on the defendant's exceptions to the allowance of the motion, and to all the proceedings had thereon. Barrows, J.:

"The defendant objects that one judgment has already been rendered and recorded against him, which will remain until reversed by some appropriate process, and he suggests danger of a double liability. We think the danger is more imaginary than real. We think the old record is effectually vacated by the allowance of this motion to bring forward the action 'that the proper judgment may be made up, and that though this could not be done where a judgment had been regularly rendered, it may be, in a case like this, where one has been improvidently entered which would, unless corrected, be absolutely invalid. * * Among the records of judgment which are irregular and will be stricken out on motion, we find mentioned those which are entered after the death of a party. Why should it not be so? The court can not proceed in a case where there is a want of living parties. Unless the case is one which can properly go forward in the name of survivors and a discontinuance as to the deceased is duly entered, every act done in the case, except those which make known the fact of decease, and tend to supply the vacancy, must be irregular and null, until some living representative of the decedent appears. Then only can a judgment be regularly rendered. Exceptions overruled."

Kelley *vs.* Hooper's Execs., 3 Yer. (Tenn.), 395, was an action of debt upon a decree of the Chancery Court of Mississippi. Judgment was rendered for the defendant on demurrer to a plea setting up that the decree had been pronounced two years after the death of the defendant.

The syllabus is as follows:

"When a party dies during the pendency of the suit, and a

judgment or decree is rendered without any notice of the party's death being taken in the proceeding, the judgment or decree is void for want of jurisdiction."

"Upon a suit founded on such decree, the want of jurisdiction in the court rendering the decree may be taken advantage of by plea, if it do not appear upon the face of the record."

The foregoing decision is followed in Morrison *vs.* Deaderick, 10 Humph., 342, and Smith *vs.* Cunningham, 2 Tenn. Ch., 565.

McCulloch *vs.* Norwood, 58 N. Y., 562, was an action upon a judgment recovered in Ohio against a corporation after its dissolution. It was held that the dissolution abated the action, and that all proceedings had therein, thereafter, including the judgment sued on, were void.

Tarleton *vs.* Cox, 45 Miss., 430, was a bill for injunction against the sale of lands, under an execution on a judgment, which had been rendered against Coopwood, and revived against his heirs. It appeared from the bill, that after the judgment had been rendered against Coopwood, he had removed the cause as plaintiff in error, to the High Court of Errors and Appeals; where his death was subsequently suggested by the defendant in error, on whose motion the case was revived in the name of Coopwood's Administrator, but without serving him or bringing him in, and was thereupon dismissed for want of prosecution. The revivor of the judgment below, against Coopwood's heirs, was had after the proceeding in error had thus been dismissed.

Says the court:

"Upon this record, the appellant propounds for our consideration, four questions. * *

"2d. Is the judgment of the High Court of Errors and Appeals, in dismissing the appeal of Coopwood, void? * *

"Having reached the conclusion that the second of these

queries must be answered in the affirmative, an adjudication of the other questions is thus rendered unnecessary. * *

"The representative of the deceased was not made a party, and the judgment was against a dead man. These fatal defects are not met by the argument of counsel, that the question presented involves only the practice of the High Court of Errors and Appeals. It is not conceived that the mode of proceeding of any court can cure a patent want of jurisdiction. The question of practice herein will arise when steps shall be taken to reinstate the case of Coopwood, deceased, plaintiff in error, against Cox, defendant in error, upon the docket of this court, and to revive the same in the name of the legal representative of the deceased; but these can in no way reconcile or overcome the jurisdictional defects which are proven to exist. Our opinion is, that the judgment of the High Court of Errors and Appeals in the case just mentioned, whereby the cause was revived and dismissed, is not available for any purpose. It follows that the court below erred in sustaining the demurrer to the bill."

In Young *vs.* Pickens, 45 Miss., 553, a suit in replevin had been brought against Calmers by two partners, Pickens and Green. During the pendency of the suit, Green, one of the partners, plaintiff, died, and by agreement between the survivor and the defendant, a compromise judgment was entered. On error by the surety on the replevin bond, it was held that the judgment was a nullity.

Said Tarbell, J.: "There is no allegation or suggestion of the death of one of the plaintiffs, and the only proof of the fact is the signature of Pickens to the agreement with Calmers as surviving partner of 'Pickens & Green.' It is a little singular that this did not attract the attention of the court and counsel at the Circuit. If one of the plaintiffs was dead, the fact should have been suggested on the record, and the cause continued in the name of the survivor as such. A judgment in favor of or against a deceased person is a nullity."

The syllabus is as follows:

"A valid judgment can not be rendered in favor of co-plaintiffs, one of whom, at the time, is dead. Such judgment is void."

Says the court, in Parker Admr., *vs.* Horne, 38 Miss., 215:

"The defendants next attempted to derive title to the property in dispute, under a purchase at execution sale, after the death of the defendant Covington. But in this they wholly failed, as the record shows that the judgment under which the sale took place, was obtained against the said Covington after his death, a few days, and without revivor, and was, for that reason, void." The action was trover by the administrator for conversion of certain cattle and stock.

In Finney *vs.* Ferguson, 3 W. & S., 413, the defense was founded on a judgment which had been confessed in another action after the death of the sole plaintiff in that action, her death having been suggested before the judgment, but no revivor having been had. The Supreme Court, reversing the decision of the Court below, held:

"The confession of a judgment by a defendant in a pending suit, after the death of the plaintiff, and before substitution of his representatives is void, both as regards the representatives of the plaintiff, and any third person who may be collaterally interested in the payment of the same."

N. O. & C. R. R. Co. *vs.* Bosworth, 8 La. Ann., 80, was a rule against the heirs of Liles, to show cause why a judgment which had been recovered against him, should not be made exigible against them, on the ground that they had rendered themselves liable by taking possession of the succession, and making an informal distribution among themselves.

"But," says the court, "there is, in fact, no judgment against Liles that can be made exigible against his heirs; he died after being cited, but before issue joined, and judgment

was entered against him through error and in ignorance of his death. That judgment is a nullity, and there is nothing for the rule to rest upon."

To the same effect is Norton *vs.* Jamison, 23 La. Ann., 102.

McCreery *vs.* Everding, 44 Cal., 284, was an action to recover possession of land. A verdict having been rendered and judgment entered for the defendants, a new trial was granted on motion of plaintiffs. The appeal was by a portion of the defendants, including Mrs. Ross, Executrix, from the order granting a new trial.

W. G. Ross was one of the original defendants, but his death had been suggested before the trial below, and Mrs. Ross, Executrix, substituted as defendant by an order entered in the minutes, but which was never served on her, and she had never appeared in the action for herself.

"If this be so," says the Court, "her rights were not affected by the trial, nor by any of the subsequent proceedings." (Judson *vs.* Love, 35 Cal., 469.) When the judgment was entered up, W. G. Ross was named both in the title of the case and in the body of the judgment as one of the defendants. This was not a judgment in favor of Mrs. Ross. As against her the case had not been tried, and no judgment could be rendered for or against her. W. G. Ross being dead, the judgment in his favor was a nullity, and there was no error in setting it aside on motion. Gregory *vs.* Haynes, 21 Cal., 443, is not in conflict with the views we have expressed. In that case, the judgment recited the death of the original plaintiff, and a continuance of the case in the name of the executor. The trial was between the living parties, and the error was one of form in continuing the name of Wenborn instead of inserting that of the executor in the title of the judgment." The order granting the new trial was

affirmed as to all the appellants except Mrs. Ross, and as to her the appeal was dismissed.

In Ewald *vs.* Corbett, 32 Cal., 493, there had been a decree of divorce against a husband, Harman, during his life, directing a division of the common property. Subsequently his executors having been substituted as defendants, a supplemental decree was made directing a sale of the property and a division of the proceeds. The plaintiffs claimed under this sale, and the defendants, under Harman's heirs. Says the court:

"The supplemental decree in the divorce suit, under which the plaintiff claims to be the owner of the whole land sued for, was, in our judgment, null and void as against the heirs at law of Harman. By the death of Harman the suit abated for all the purposes of further judicial action therein on the subject of partitioning the common property, and the court had no jurisdiction to adjudge that the property should be sold and the proceeds divided without a revivor as to the heirs. No such revivor was had, and the interests of the heirs were therefore unaffected by the supplemental decree and the transactions under it."

Judson *vs.* Love, 35 Cal., 463, was an action of ejectment, in which the court below had passed judgment in favor of all the defendants. The plaintiffs' motion for a new trial having been overruled, they appealed from both the judgment and the order denying a new trial. Love, one of the defendants, had died subsequent to the judgment, but before the order denying the new trial. His executor moved to dismiss the appeal, and it was dismissed as to Love.

By the court, Sawyer, C. J.:

"A motion is made to dismiss the appeal as to the defendant, Love, based, firstly, upon exceptions to the transcript; and, secondly, upon affidavits filed, showing that defendant, Love,

died on the 5th of March, 1866, after the rendition of the verdict in the court below, and before any notice of intention to move for a new trial was given, on the ground that all subsequent proceedings on motion for new trial, and the attempt to appeal, are void and ineffectual for any purpose as to said defendant, Love, and his successors in interest, for want of any proper party to the suit, or of any person upon whom a valid service of papers could be made.

"It does not appear that the death of Harlow S. Love was ever suggested in the court below, or that his representatives have ever been in any way made parties to the action. * *

"It is clear that all these proceedings, except the entry of judgment on the verdict before rendered, had since the death of defendant, Harlow S. Love, on the 5th day of March, 1866, are irregular and void as to him and his successors in interest. There was from that time forth no party before the court as to the interest of Love in the matter in controversy, and no one authorized to represent it. The power of attorney necessarily ceased with the death of the principal. No further proceedings could be had without bringing in the representatives of Love. The Practice Act authorizes a judgment to be entered upon the verdict, when a party dies after a verdict and before judgment (Section 202), but this is as far as it goes. * *

"It can make no difference whether the deceased is the appellant, or moving party, or the respondent in the proceeding. His former attorney could not give a notice of motion for new trial or of appeal, that would be effectual, for he has ceased to have any authority in the matter. If he has no authority to give such notice, he has none to receive one, or act upon it in the further stages of the proceedings, when it is received. He has become a stranger to the proceedings. * *

"It is claimed, however, that we must take the transcript as we find it, and that we can not inquire into the death of the defendant, unless that fact is disclosed in the record of the court below. The record could not disclose the fact, unless it

had appeared somewhere in the course of the proceedings. The death of defendant never was brought to the knowledge of the court below. The appellant did not suggest the defendant's death, or move to continue the action against his representatives. The plaintiff was the only party interested in bringing in the representative. The representative was not bound to thrust himself unbidden into the action. He was safe, for no valid proceeding could be taken by the appellant without him. The record below could not disclose the fact of defendant's death, for it was no part of the proceedings in the case. Even if we were to proceed further on this appeal, and render judgment, it would be a nullity, whether we are informed of the decease of defendant, judicially, or not. It would be useless, therefore, to entertain the appeal."

Griswold *vs.* Stewart, 4 Cowen, 457, was *scire facias* on a judgment. Plea that the defendant had died twenty-four days before the rendition of the judgment against him; and that the judgment was obtained by default and without issuing any *scire facias*.

Curia, per Sutherland, J.

"If then, the defendant has a right to set up this matter of defence, is it not conclusive to show the judgment which is sought to be enforced, absolutely void as against the defendant? It was a judgment by default, not by confession or verdict, and, therefore, not within the Statute 17 Car. 2, c. 8, which provides that the death of either party, between verdict and judgment, shall not be alleged for error, so as the judgment be entered within two terms after the verdict; nor within the Act of April 15, 1814 (Sess. 37, ch. 200, s. 40), which has a provision similar to the last in relation to judgments entered by confession, after the death of the defendant, so that they be entered in two terms after the signing a plea of confession, in actions pending during the defendant's life-time; nor is it within the 10th section of the Act concerning executors and administra-

tors (1 R. L., 312), which provides that judgment shall not abate by the death of either party, after interlocutory judgment (8 and 9 W. 3, c. 11; Tidd, 847), for the representatives of the deceased were not brought in and made parties by *scire facias*, which was necessary by that Statute.

"Nor can the judgment be supported on the ground of relation. It can not relate back to a period anterior to the term as of which it was entered. It was entered on the 29th October, 1813, *i.e.*, during the October term, which commenced on the third Monday of that month. Walton died on the 5th, about a fortnight before the term commenced. The judgment is, therefore, void; and the demurrer consequently well taken."

In Haydock *vs.* Cobb, 5 Day (Conn.), 527, which was an action of disseisin, the plaintiffs' title depended upon a decree which he had obtained in a Court of Chancery against one Howard, vesting him with title.

The defendant introduced evidence showing that Howard had died before the passing of the decree in the Chancery suit, and thereupon the issue was found in his favor.

Trumbull, J., delivering the opinion of the court: "The only question in the case is, whether testimony that Howard was dead at the time of passing the decree in Chancery, on which the title of Haydock is founded, was relevant and admissable on the trial. * * If he was dead at the time of the decree, there was no party on whom the decree could operate. His heir, in whom whatever title Howard might have acquired in his life, was in law vested on his decease, could not be divested of it by a decree which, as to him, was passed merely *ex parte*. I am of opinion, therefore, that the evidence was relevant, and admissable, and that no new trial ought to be granted."

The foregoing case is not in conflict with Brown *vs.* Wheeler, 18 Conn., 207, relied on by our opponent. There, the plaintiff died during the term, and the court, considering the term as a

day, simply made the judgment relate back to the first day of the term.

In Colson's Executors *vs.* Wade's Executors, 1 Murphey (N. C.), 43, judgment was entered against the defendants by default, and writ of inquiry awarded. Subsequently the writ was executed, damages assessed, and final judgment rendered against the defendants. One of the defendants had, however, died between the judgment by default and the final judgment. Error by the executors of another defendant.

By the Court: "The judgment in this case is erroneous and void in law. Let it be reversed, and the plaintiffs in error be restored to all things which they have lost thereby, and the defendants in error pay the costs."

In Gerry *vs.* Post, 13 Howe Pr., 118, where a judgment of foreclosure and sale had been entered, but afterwards opened up, and a new judgment entered, the plaintiff having died prior to the entry of the second judgment, it was held that the second judgment and the purchaser's title under it were void. In the course of the opinion the court says: "At common law death abated all actions, so as to put an end to them, and compel the representatives of the decedent to begin as if the first action had never been instituted. Various statutes were passed to cure this evil; but in all, it will be found that the action was suspended by the death, and that no proceedings could be had in it until the new parties were brought in, except in two special cases." He then states the two special cases referred to, under the statute providing for entry of judgment within two terms, where either party died after verdict, adding: "But if the verdict were entered after the death of a party, although he were alive at the beginning of the circuit or term, the verdict was absolutely void."

Morse *vs.* Toppan, 3 Gray, 411, was an action on a judgment recovered against a married woman. It was held to be void. Shaw, C. J., delivering the opinion of the court, based their decision upon the ground that "a judgment is in the nature of a contract; it is a specialty and creates a debt, and to have that effect it must be taken against one capable of contracting a debt." This theory presents an insuperable objection to the validity of a judgment rendered in favor of a dead man.

In Loring, Administrator, *vs.* Folger, 7 Gray, 505, it was held that a judgment recovered against a trustee in a process of foreign attachment, after the death of the principal defendant, was entirely void, and that the payment thereof on execution, by the trustee, was no defense to a suit against him by the administrator of the *cestui que trust.*

"The only real question in the case," says Dewey, J., "is, whether it is to be treated as wholly void, or merely voidable upon a writ of error brought by the administrator or legal representative of Finch.

"The cases bearing upon this question are very few. In Randall's case, 2 Mod., 308, where such a judgment was set up, and the other party replied that the defendant died before judgment was obtained, the judgment was held ill, and the court were of opinion that the plaintiff might avoid the judgment without a writ of error. In the case in 1 Salk, 8, where a judgment was sought to be set aside because the defendant had died before the assizes began, the court held such death would be fatal to the judgment; but if the death happened after the assizes began, it might be otherwise. It was further held that it was in the discretion of the court whether the party should be put to his writ of error; and in that case, for the purpose of settling the fact as to the time of the death, the party was put to his writ of error. In Bragner *vs.* Langmead, 7 T. R., 20, where the question arose whether the judgment might not be

saved by considering it as rendered on the first day of the term, which would have been prior to the death of the party, it seemed to be conceded that it would be a bad judgment unless saved by this fiction of law of the English courts.

"In the case of Morse *vs.* Toppan, 3 Gray, 411, a judgment against a married woman was, upon an agreed statement of facts, admitting such fact of marriage, held absolutely void, and the objection was allowed without any writ of error or reversal of the judgment."

Randall's Case, 2 Mod., 308, was an action upon a bond against the defendant as administrator, who pleaded a judgment recovered against the intestate. Plaintiff replied that the intestate was dead when the judgment was rendered. Upon demurrer "the court were of the opinion that the plaintiff might avoid the judgment without a writ of error, especially in this case, where it is not only erroneous, but void."

Warter *vs.* Perry & Spring, 3 Cro. Eliz., 199, was *scire facias* against the defendants as mainpernors of Broke. "They pleaded that B. was dead the day of the judgment given. The court at first held it no plea; for it goeth in avoiding the judgment, and proveth it to be erroneous, which can not be avoided but by error. But they might plead the death of Broke before the *scire facias* and after judgment; for then they could not bring in the body. But afterward the plea was received, because they can not have a writ of error to reverse the judgment."

It is assumed by Lane, C. J., in Smith *vs.* Pratt, 13 Ohio, 550, that a judgment after the decease of one of the parties is void. "If," he says, "a court falsely assumes the existence of the fact on which their jurisdiction depends, and carry into the record their finding of its existence, the proceedings, although void, yet admit reversal on error, since it may afford the only

effectual protection of the party. Upon this principle judgments against *femes-covert*, or a person deceased, although void, are reversible at common law, upon the assignment of the error in fact."

The same assumption is made by Johnson, J., in Walton's Admr. *vs.* Williams' Admr., 28 Ohio St., 478, where, speaking of a petition in error involved in the case, he says it was not to reverse, "because the plaintiff was dead when the judgment was rendered, and which was therefore void."

The doctrine that an action abates upon the death of either party is not only a principle of the common law, but a necessary conclusion of juridical logic, for without adverse parties there can be no action.

Abatement is also the necessary result of the fact that the death of a party terminates his attorney's authority, and leaves his interests without representation. Judson *vs.* Love, 35 Cal., 463. The decree sued on below was drafted and procured by an attorney who represented no one.

At common law an abatement by the death of either party absolutely ended the action. If the abatement occurred before judgment, no judgment could be entered; if after judgment, no execution could issue. If the right or obligation survived, it could only be enforced by an entirely new action brought by or against the decedent's representative.

"An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended." Story's Eq. Pl., sec. 354.

"By the common law all proceedings in a suit at law are stopped by the death of one of the parties. If either of them die before judgment, no judgment can be entered; if after judgment, no execution can issue." Hildreth *vs.* Thompson, 16 Mass., 191.

"Where the abatement is total—*i. e.*, where it is caused by the death, bankruptcy, insolvency, or marriage of the plaintiff (being a female)—the cause is completely suspended, and can not be proceeded in till it has been revived, or the defect caused by the abatement cured; and, in general, all orders made pending such abatement will be considered nugatory." 2 Daniels' Chancery, 1542 (5th Ed.)

It is immaterial at what stage of the case the abatement takes place. Whatever the stage, all future judicial action is necessarily stopped. The fact that a cause has been submitted and argued can not prevent the necessary consequences of abatement upon the power of the court to render and enter judgment. Besides, the argument and submission of a cause is not the end of the essentially adversary proceedings. There may be a re-opening of the case upon amended pleadings, such as occurred at bar; while exceptions to the judgment, the bill of exceptions, motion for new trial, or notice of appeal, are ordinary and usual incidents.

Even the power to enter, without revivor, a decree actually rendered before abatement, is denied by the weight of authority.

"Where the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed." 2 Daniels' Chancery, 1543 (5th Ed.)

In Bertie *vs.* Lord Falkland, 1 Dickens, 25, the case was heard and determined, and notice of appeal entered on the minutes of the decree, but the decree remained undrawn until the suit abated by defendant's death. "The plaintiff applied to have the decree drawn *nunc pro tunc;* it was objected that the suit being abated, ought to be revived." Said Lord Chancellor Cowper :

"The drawing up of a decree is as material a thing as can be taken care of, and to pass and enter a decree *nunc pro tunc*, is to debar the representative of the deceased party from taking that course he may be advised; therefore, the suit ought to be revived before the decree be passed, and entered *nunc pro tunc*."

The provision of the Iowa statutes (Revision of 1860), Sec. 3469 (Record 11), was for a revivor, "when one of the parties dies before the *judgment*."

In England Stat. 17, Car. 2, c. 8, s. 1, and subsequently 15 and 16 Vict., c. 76, s. 139, provided, that in case of death after verdict, judgment might be entered *nunc pro tunc* within two terms.

But in Copley *vs.* Day, 4 Taunt., 702, it was held that, after the time thus limited by the statute, the court had no authority to enter judgment.

In New York, 2 Rev. Stat., 402 (2d Ed., 1860), in Massachusetts, Gen. Stat., 1860, c. 133, s. 7, and in other States, there are similar statutes providing for the entry of judgment within a given time after verdict. But they only argue the rigor of the common law. Section 5, of the New York Statute, is as follows:

"Nothing herein contained shall be construed to authorize a judgment against any party who shall have died before verdict actually rendered against him, notwithstanding he may have died on the first or any other day of the term at which such verdict shall have been taken; but such verdict shall be absolutely void."

But no statutory authority is cited to support the entry of the decree sued on; nor would it fall within the terms of any such statutes as those above referred to, for there had been no

finding or other provisional determination of the issues prior to the abatement. On the contrary, the issues made by the pleadings as originally submitted were subsequently changed by the amended answer which Mitchell was permitted to file, as appears from the decree set forth as an exhibit to the petition below, and the issues actually determined were only presented after the court had, during the abatement, and three years after the plaintiff's death, performed the important judicial act of striking this amended answer from the files.

We do not of course dispute the power of a court or its clerk to perform the ministerial service of entering, even after abatement, a judgment actually rendered before, nor do we deny the power of a court, so long as it retains jurisdiction, to provide that its decrees shall have effect as of any given time. But our contention is, that a court after it has lost jurisdiction by the abatement of the action, has no power to render judgment either *nunc pro tunc* or otherwise, or to perform any judicial act. It can not supply a defect of jurisdiction by pretending that the judicial act was done at a different time, or by attempting to give it effect as of some other date.

Says Hitchcock, J., in Ludlow Heirs *vs.* Johnston, 3 Ohio, 576:

"It is not sufficient that they (the court) might once have had jurisdiction, that they might have had it in May (the date to which the *nunc pro tunc* relates), for instance, *but the jurisdiction must remain when the act is done.* Turn whatever way we can, view the question in whatever position it has been or can be presented, still the fact remains, and is proved by the record itself, that the order was actually made in August (the date of the *nunc pro tunc* entry). The court, it is true, attempted to give it effect by directing that it shall 'be considered as of May.' But this adds nothing to its validity, unless when

the direction is given the jurisdiction remains as it was at the time from which the order is directed to be considered. * *

"To decide differently would be to adopt a principle by which a court would be enabled to retain a jurisdiction once possessed, and exercise that jurisdiction, contrary to the will of the Legislature, by merely making *nunc pro tunc* entries. Such a principal must be fraught with infinite mischief."

Upon an analogous principle, the United States Circuit Courts, in Gibson *vs.* Johnson, 1 Peters' C. C. 44, and Ward *vs.* Arredondo, 1 Paine's C. C. 410, refused to accept jurisdiction, which the State Court attempted to confer, by causing a petition for removal to be entered *nunc pro tunc* as of a time prior to its being actually filed.

But the *nunc pro tunc* provision contained in the decree sued on was a pure fiction. "A court can enter no order *nunc pro tunc* unless one was actually made and omitted to be entered." Torbet *vs.* Coffin, 6 Ohio, 34.

A *nunc pro tunc* decree "must be based on the previous act of the court. It must be observed that the entire purpose of entering judgments and decrees, as of some prior date, is to supply matters of evidence, and not to supply or modify matters of fact. The failure of a court to act, or its incorrect action, can *never* authorize a *nunc pro tunc* entry. If no judgment be rendered, or if an imperfect or improper one be rendered, the court has no power to remedy the omission by treating it as a clerical misprision." Freeman on Judgments, section 68.

Nor can a *nunc pro tunc* order be founded on parol. There must be a written minute among the records to sustain it. Ludlow Heirs *vs.* Johnston, 3 Ohio, 577.

A court can not, by a *nunc pro tunc* order at a subsequent term, receive a bill of exceptions, or give validity to a notice

of appeal, which the record does not show to have been in fact filed or made at the proper term. Irvine *vs.* Brown, 6 Ohio St., 12. Busby *vs.* Finn, 1 Ohio St., 409. Markman *vs.* Doreat, 21 Ohio St., 637.

But in no case can a *nunc pro tunc* judgment be rendered unless the cause was ready for final judgment at the time to which the *nunc pro tunc* relates. Freeman on Judgments, section 59.

"Where on demurrer to a declaration, judgment is rendered for the plaintiff, with leave to the defendant to amend on payment of costs, the plaintiff will not be permitted to enter judgment as of a previous term *nunc pro tunc*, although it be shown that the defendant died during the term in which the cause was submitted; the suit is abated and the plaintiff must seek his remedy against the personal representatives of the defendant. It is only where the judgment is final, that it is allowed to be entered as of a term when the party was living." North *vs.* Pepper, 20 Wend., 677.

In Hemming *vs.* Batchelor, 10 L. R. Exch., 54, the judge directed a non-suit at the trial, but stayed execution until the fifth day of the following term, that the plaintiff might move to set aside the non-suit. The plaintiff died before the next term. In that term, a rule was obtained by the defendant to enter judgment of non-suit *nunc pro tunc*, but it was discharged by the court, on the ground that the non-suit entered during the plaintiff's life was provisional and subject to approval, and that the action had abated before any final judgment could be pronounced.

We have already called the attention of the court to the facts recited in the decree itself, showing the re-opening of the case in Iowa after its original submission. Upon the principle of the foregoing cases, the *nunc pro tunc* provision was therefore improper.

We understand that it will be claimed by the defendant in error, that the particular provisions of the laws of Iowa relating to revivor, which the Circuit Court found to have been in force during the pendency of the suit in that State, were in fact repealed in 1862 by chap. 174, sec. 4, of the Acts of the Ninth General Assembly of Iowa, and that the following section was substituted for them, and was in force at the time referred to, viz.:

"Section 3467. Actions, either *ex-contractu* or *ex-delicto*, do not abate by the death, marriage or other disability of either party, nor by the transfer of any interest therein, if from the legal nature of the case the cause of action can survive or continue. In such cases the court may, on motion, allow the action to be continued by or against his legal representatives or successor in interest; but in case of the death of a defendant, a notice shall be served upon his representative, under the direction of the court."

We do not understand that the defendant in error is entitled to dispute here the findings of the court below, as to the provisions of the statute law of Iowa in force at the time referred to. That was a question of fact below, inasmuch as it related to the law of a State not within the territorial limits of the court's jurisdiction, and of which it was not, therefore, bound to take judicial notice. Greenleaf on Evidence, sec. 6.

But it would not affect the question of the abatement of the Iowa suit, and the consequent want of jurisdiction of that court, to render the decree sued on, if it were true that the statute referred to by defendant in error had taken the place of the provisions found by the Circuit Court to have been in force.

A rule of court similar to the statute referred to has recently received construction in England.

Rules of Court 1875, Order L., r. 1 (see L. R. 5 Ch. D., 845, n. 1) provide that:

"An action shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survive or continue; and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*."

In Eldridge *vs.* Burgess, L. R. 7, Ch. D., 411, it was held that the foregoing order applies only when the cause of action survives or continues in some person who is before the court. In the case before the court, after issue had been joined, and notice of trial given by the sole plaintiff, he was adjudicated a bankrupt, and the cause coming on for trial, no revivor having been had in the name of the Trustee in Bankruptcy, the court held, "that the action had abated, and that the only order which could be made was to strike the action out of the list;" and that was accordingly done.

"The provisions that the action shall not *abate* by the death, etc., of a party, do not permit it to proceed against the dead party, but require that his representative or successor in interest be regularly brought into court. Section 121 of the Code does not specifically refer to actions against corporations, but provides generally that 'No action shall abate by the death, marriage or other disability of a party, or the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or disability of a party, the court, on motion at any time within one year thereafter, or afterward on a supplemental complaint, may allow the action to be continued against his representative or successor in interest. In case of any transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.' This section, it is very clear, if applicable, by analogy, to an action

against a corporation; does not sanction the idea that the action can be continued against the corporation after its death, but requires that before the action can proceed, the representative or successor in interest should be brought in." McCulloch *vs.* Norwood, 58 N. Y., 567.

Jarvis *vs.* Felch, 14 Abb. Pr., 46. Monell, J. "By section 121 of the Code it is provided that no action shall abate by the death of a party; but the court, on motion, at any time within one year thereafter, or afterward on a supplemental complaint, may allow the action to be continued by the representative. The death of a sole plaintiff, although it does not in the language of the Code 'abate' the action, suspends all further proceedings until there is a revival by the personal representative of the deceased; so that no step can be taken in the further prosecution of the action until it has been continued by order of the court."

In that case a motion was granted setting aside an order dismissing the complaint, entered after the death of the plaintiff and without revivor.

Tarleton *vs.* Cox, 45 Miss., 430 (see p. 436), cited *ante* p. 10, in which it was held that an order made in a proceeding in error in the High Court after death of one of the parties, and without revivor, was void—was decided with reference to the following provision of the Code of that State:

"If either the plaintiff in error or the defendant should die after the cause has been removed to the High Court, and before the decision thereof, the suit shall not abate, but the legal representatives of such deceased parties may come voluntarily and make themselves parties, and have the cause revived in their names, and if they should fail to do so, they may be brought in by *scire facias*."

The same is true of the decision in Murphy *vs.* Redmond, 46 Mo., cited *ante* p. 7. The statute of that State declaring that

actions shall not abate by death, but may be continued in the name of the representatives, etc., is quoted in 19 Mo., 35, and is similar to the Iowa statute cited by defendant in error.

The result of such a statute would be, not to affect the abatement necessarily consequent upon the death of a party, but simply to provide for resuscitating the dead action, and to substitute a general provision upon that subject in the place of the special provisions found by the Circuit Court to have been in force.

The doctrine of revivor recognizes, and is in fact an outgrowth of, the doctrine of abatement. It is borrowed from the *citatio ad reassumendam causam* of the civil law, and simply supplies a method by which the necessity of a new action, by or against the representative upon whom the right or obligation has devolved, is obviated by permitting him to prosecute, by coming into, or to be prosecuted by being brought into, the former action.

In Welch *vs.* Battern, 47 Ia., 147, it was held by the Supreme Court of Iowa, in a case arising during the same period as the one at bar, that a sale under an execution issued after the decease of the defendant was void, and that the common law rule on this subject was not changed by the statutes of that State.

But the defendant in error certainly can not controvert the allegation in our answer (Record 6), which he did not deny in his replication, that by the law of Iowa in force at the time of Stutzman's death, and of the rendition of the decree, it was provided that an order to revive an action in the name of the representative or successor of the plaintiff, might be made forthwith, but could not be made without the consent of the defendant

after the expiration of one year from the time the order might first have been made; *i. e.*, after one year from the plaintiff's death, because by the preceding clause the order might have been first made immediately upon the happening of that event. Sec. 3478 of the Revision of 1860 (Record 11), further provided that, when it should appear by affidavit, or otherwise, that either party to an action had been dead for a period so long that it could not be revived, which, under the preceding section, would be the period of one year from plaintiff's death, the court should order the action to be striken from the docket.

The decree sued on below was therefore rendered, not only in an abated action, and in favor of a dead man, but in an action which was passed reviving, and which ought to have been stricken from the docket.

If this be so, the judgment, with its *nunc pro tunc* fiction, was simply a surreptitious evasion of the express limitation of the statute, effected years after the cause had been abandoned, and without notice to, or knowle lge of, the defendant.

But if we be wrong, in claiming that the time for revivor had passed, then the proper course for defendant in error, is now to seek a revivor, that there may be a fair and open trial, and a judgment which shall bind both parties; for, had the decree been the other way, the defendant in error would not have been bound by it.

We, therefore, respectfully submit, that the decree sued on was not only without jurisdiction, being in an abated action, and a nullity, because in favor of a dead man; but that it was in direct violation of the positive law of the State, requiring revivor, and that within a time which had already expired.

The *nunc pro tunc* provision contained in the decree does not give it validity,

(1) Because it is a pure fiction, which does not relate to any actual judicial act.

(2) Because the relation back is broken by the intervening change in the pleadings.

(3) Because jurisdiction being gone at the time of the actual judgment, the court was as powerless to render a *nunc pro tunc* decree as to perform any other judicial act.

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